
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

ROBERT W. ROBERTS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 20858 ✓

On Appeal from the Judgment of
The United States District Court
For the District of Arizona

BRIEF FOR APPELLEE

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**I.
JURISDICTIONAL STATEMENT OF FACT**

On January 13, 1966, Appellee, United States of America, was served with a copy of Appellant Robert W. Roberts' Motion pursuant to 28 U.S.C.A., §2255, attacking a sentence imposed by the U. S. District Court for the District of Arizona. On January 28, 1966, the Appellee, United States of America, filed its response to the said motion and sent a copy of said response by mail to the Appellant.

On February 1, 1966, the U. S. District Court for the District of Arizona, the Honorable James A. Walsh presiding, entered an Order that the petitioner (Appellant Robert W. Roberts) take nothing by his petition and that the same be dismissed. On February 14, 1966, the Notice of Appeal was lodged and on February 16, 1966, the said Court entered an order directing the Clerk to file the handwritten Notice of Appeal without prepayment of costs or fee. This is an appeal under 28 U.S.C.A., §1291.

II. STATEMENT OF FACTS

On May 25, 1964, in United States of America, Plaintiff, v. Robert Walter Roberts, Defendant, Cause No. C-18959-Tucson, in the U. S. District Court for the District of Arizona, the Honorable James A. Walsh presiding, the Court entered an Order revoking the probation of Robert Walter Roberts, the Appellant herein, and committed him to the custody of the United States Attorney General for two years. (Item 1 of the Transcript of the Record on Appeal.) On February 10, 1965, Robert Walter Roberts was paroled (lines 6 and 7, page 2, of Item 5a of the Transcript of the Record on Appeal).

On June 14, 1965, in United States of America, Plaintiff, v. Robert Walter Roberts, Defendant, Cause Number C-19339-Tucson, in said U. S. District Court for the District of Arizona, the Honorable James A. Walsh presiding, the Court entered an Order and Judgment of Conviction and committed Robert Walter Roberts (the Appellant herein) to the custody of the United States Attorney General for eighteen months (Item 3 of the Transcript of the Record on Appeal). After imposing sentence the Court, in response to a question from Robert Walter Roberts (the Appellant herein) stated:

The Court: "No, I had finished, and I was going to say this to you, and I may tell you what you were going to ask about. I understand the parole violation warrant is conditioned on its being returned unserved if you are sentenced on the failure to register count. I am sentencing you on the basis that you will not be returned for parole violation, may be required to serve the remainder of your sentence. If it should turn out that I am misinformed in that, I can correct it, but the sentence is being imposed with the understanding that you will not be required to serve the remaining time on your former sentence by reason of the parole violation." (Line 18, page 4, through line 4 of page 5 of Item 5a of the Transcript of the Record on Appeal.)

Thereafter, when the Appellant herein notified the Court that the parole in the first case, Cause No. C-18959-Tucson, had been revoked, the Court, in C-19339-Tucson, entered an order as follows:

"Treating the defendant's letter dated July 20, 1965 and received on July 21, 1965, as a motion for reduction of sentence, it is ordered that the judgment entered in this cause on July 14, 1965, is amended and modified to provide that the defendant be committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment for a period of six months, the sentence to begin to run on June 14, 1965." (Item 4 of the Transcript of the Record on Appeal.)

Thereafter, on November 4, 1965, the Court in said Cause Number C-19339-Tucson, entered an Order as follows:

"The Court having on August 23, 1965, attempted to modify and reduce the sentence imposed in this Court on

June 14, 1965, to provide that the defendant be committed for imprisonment for a period of six months, and such order of August 23, 1965, being illegal in view of the one-year minimum sentence provided for by Section 1407, Title 18, United States Code,

"IT IS ORDERED that the order of August 23, 1965, is vacated; and

"IT IS ORDERED, FURTHER, that the imposition of sentence in this case is suspended for a period of two years from this date and the defendant is placed on probation upon condition that he conduct himself in all respects as a law-abiding citizen during the period of probation, that he make the reports and carry out the directions given to him by the probation officer who has supervision in his case, and that he do not leave the District of Arizona without permission of the probation officer." (Item 4 of the Transcript of the Record on Appeal.)

On January 16, 1966, the Appellant filed the action herein, Cause Number Civil-2130-Tucson (Item 5 of the Transcript of the Record on Appeal). On January 28, 1966, the Appellee filed its Response (Item 6 of the Transcript of the Record on Appeal). On February 1, 1966, the Court entered its Order dismissing the petition of Appellant (Item 13 of the Transcript of the Record on Appeal), and the Appeal followed, as stated in the Jurisdictional Statement of Facts.

III.

PROPOSITIONS OF LAW

1. A Motion to Reduce a Sentence may be made within sixty days of the original sentence.

2. An Illegal Sentence may be corrected at any time.

3. A Motion to Vacate and Set Aside Sentence imposed in criminal proceeding is available only to attack a sentence under which Appellant is in custody.

IV.

SUMMARY OF ARGUMENT

1. The Order entered by the Court on August 23, 1965, was made pursuant to the Motion to Reduce made by Appellant July 21, 1965.

2. The Order entered on November 4, 1965, was to correct an illegal sentence.

3. The Appellant cannot attack the sentence imposed by the Court in Cause No. C-19339-Tucson since he is not in custody under it.

V.

ARGUMENT

1. The Order entered by the Court on August 23, 1965, was made pursuant to the Motion to Reduce made by the Appellant on July 21, 1965.

Rule 35 of the Federal Rules of Criminal Procedure, Title 18 U.S.C.A., provides that the Court may reduce a sentence within sixty days after it is imposed.

As the Court stated in its Order of August 23, 1965, the Court treated Appellant's letter received by the Clerk on July 21, 1965, as a Motion to Reduce Sentence. This Motion of

Appellant was well within the sixty day period of Rule 35. (Unfortunately U. S. District Judge James A. Walsh was on assignment to the Phoenix Division of the District of Arizona in July, and to the Southern District of California for the first two weeks in August.)

2. The Order entered on November 4, 1965, was to correct an illegal sentence.

Appellant was convicted of a violation of 18 U.S.C.A., §1407, in Cause No. C-19339-Tucson, the penalty for which is one to three years. A sentence for six months under this Section is illegal. Therefore the sentence imposed on August 23, 1965, by the Court for six months is illegal and, pursuant to the provisions of Rule 35, may be corrected at any time.

3. The Appellant cannot attack the sentence imposed by the Court in Cause Number C-19339-Tucson since he is not in custody under it.

Appellant is in custody under the sentence imposed in Cause Number C-18959-Tucson as a parole violator. He is not in custody under any sentence imposed under C-19339-Tucson. Therefore, not being in custody under the sentence under attack, a motion for relief under this Section is not available to Appellant. *Lopez v. United States*, (9th Cir., 1951, 186 F.2d 707; *Oughton v. United States*, (9th Cir., 1954), 215 F.2d 578; *Hoffman v. United States*, (9th Cir., 1957), 244 F.2d 378; *Toliver v. United States*, (9th Cir., 1957), 249 F.2d 804; *May v. United States*, (9th Cir., 1958), 261 F.2d 629; *Migdol v. United States*, (9th Cir., 1961), 298 F.2d 513; *Williams v. United States*, (9th Cir., 1956), 236 F.2d 894, cert. den. 352 U.S. 982, cert. den. 356 U.S. 941.

If the Court, on November 4, 1965, had sentenced Appellant to two years and then had suspended imposition of sentence for two years, there might be some merit to Appellant's

argument that he should have been present on November 4, 1965. However, the imposition of sentence was suspended for two years, which constitutes a reduction of sentence for which he does not have to be present. Nevertheless, Appellant is not in custody under the sentence.

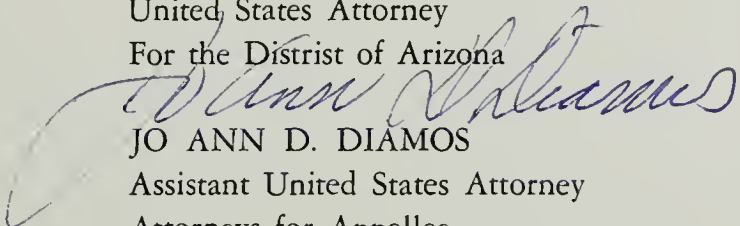
(From the records of the La Tuna Federal Correctional Institution it appears the warrant for violation of parole, dated May 10, 1965, in Cause Number C-18959-Tucson, was executed November 4, 1965; the hearing was held November 15, 1965, and parole was revoked November 29, 1965. Appellant's expected release date is October 6, 1966.)

VI. CONCLUSION

The Appellant, having asked the Court in July, 1965 to reduce the sentence of eighteen months imposed in Cause Number C-19339-Tucson, and the Court having done so, in August, 1965, but the Court having only imposed a sentence of six months, which was corrected in November, 1965, by suspending imposition of sentence for two years, the Appellant has no grounds to attack the sentence since he is not in custody under it, and the Order of the Trial Court herein on February 1, 1966, should be affirmed.

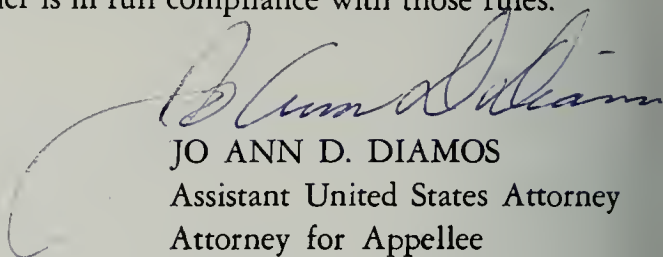
Respectfully submitted,

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For the District of Arizona



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Assistant United States Attorney
Attorneys for Appellee

I certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.



JO ANN D. DIAMOS
Assistant United States Attorney
Attorney for Appellee

Three copies of the within Brief of Appellee mailed this
.....²⁹..... day of April, 1966, to:

ROBERT WALTER ROBERTS
Federal Correctional Institution
La Tuna, Texas